United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

ORIGINAL and PROOF OF SERVICE

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P/S.

74-1330

To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

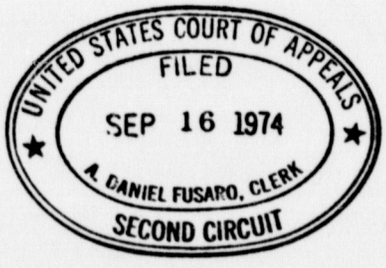
ARIEL FERNANDEZ-TORRES, : Docket No. 74-1330

Appellant. :

----------x

SUPPLEMENTAL BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK.



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ISSUES PRESENTED

1. Whether appellant was denied the effective assistance of counsel.

2. Whether appellant was denied his right to confront the evidence offered against him by the government.

INTRODUCTION

This appeal is from a judgment of the United States District Court for the Eastern District of New York (Costantino, J.), rendered March 8, 1974, convicting appellant after trial by jury of possession of a controlled substance with intent to distribute (2 counts) and distribution of a controlled substance (2 counts) [21 U.S.C. §841(a)(1)] and sentencing him to eight years on count one, eight years on count two, six years on count three and six years on count four, all concurrently and followed by five years special parole.

Timely notice of appeal was filed, and this Court originally continued Thomas J. Lilly, appellant's appointed trial counsel, as counsel on appeal, pursuant to the Criminal Justice Act. On June 18, 1974, Mr. Lilly filed a brief on behalf of appellant.

At the request of appellant, this Court then relieved Mr. Lilly of his appointment and, on July 30, 1974, this Court appointed Jesse Berman, Esq., as substitute counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently incarcerated in Lewisburg, Pa. pursuant to the sentence herein.

* * * *

This supplemental brief for appellant concerns itself exclusively with appellant's claim that he was denied

effective assistance of counsel at trial. The facts relating to those appellate points raised in appellant's original brief have already been set forth in that brief. Thus, this supplemental brief will discuss only those facts which relate to the ineffective assistance of counsel point, and , as such, are set out within the argument of the counsel point (Point IV, infra).

At the close of the argument section of this supplemental brief, we have also included an amplified discussion of the confrontation point presented as POINT I of the original brief. It should be understood that this supplemental bried does not replace the original brief filed with this Court, but rather amplifies one argument found in that brief, and adds the additional point on effective assistance of counsel.

POINT IV

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

On October 10, 1973, appellant was arraigned before Magistrate Catoggio, who appointed Thomas J. Lilly as counsel, pursuant to the Criminal Justice Act. Seven weeks later, on November 29, 1973, appellant had been speedily tried and convicted. He is now serving an eight year sentence.

Appellant was incarcerated from the time of his arrest and was thus not free to conduct his own investigation of the facts involved in his case. The crimes charged herein had allegedly been committed on

two isolated dates in June and July of 1971, almost two and a half years before the trial. The record is silent as to what investigation, if any, Mr. Lilly made during the seven weeks between arraignment and trial, but the record casts serious doubt over the effectiveness which Mr. Lilly gave appellant at trial:

1) No Wade-Simmons or Discovery Motions

Mr. Lilly never made any pre-trial motions other than a motion to dismiss on speedy trial grounds and a catch-all Brady v. Maryland demand. Significantly, he never moved to suppress any identification testimony. Nor did he ever ask for a hearing to develop the possibility of showing that the identification testimony was the product of or was tainted by suggestive line-ups or show-ups or suggestive displays of photographs. United States v. Wade, 388 U.S. 218(1967); Simmons v. United States, 390 U.S. 377(1968).

Mr. Lilly merely asked the Court to charge the jury that the passage of time affects the quality of eyewitness identification [Appellant's Point III (c), at p.16 of appellant's original brief].

The ultimate issue is not one of whether appellant would have prevailed on a motion to suppress the identification. The real issue here, as any criminal trial lawyer knows, is that when there is a serious identification question in a case, and when the original opportunity to observe was two and a half years before

trial, with no intervening observation, the proper thing to do is to move, before trial, to suppress such identification, and to seek discovery of the nature of the original observations and of any intervening line-ups, show-ups or photo dpreads.

The failure of Mr. Lilly to do so cannot be excused as "trial strategy," for, manifestly, Mr. Lilly's "strategy" was to attack the identification. He put appellant on the stand and him testify that he was not present at the time of the crime. He also sought a charge on the dangers inherent in identification testimony. It thus cannot be claimed that Mr. Lilly intentionally avoided discovery and suppression of identification as part of some theoretical trial strategy, for that would be absolutely inconsistent with Mr. Lilly's actual strategy.

2) Failure to Object to Leading Questions

Valdez was the prosecution's chief witness; without his testimony there was no case. Valdez was called to testify to events that had allegedly happened two and a half years earlier. Thus, every additional bit of detail that could be added to Valdez's testimony would tend to increase his credibility. To appellant's misfortune, however, many of the details came out not from Valdez, but from the prosecutor, for Mr. Lilly failed to object to a single one of a long series of leading questions:

Q:(by the prosecutor) One of these agents was Agent Carter?

A:What's that?

Q: One of these agents was Agent Carter?

A: Carter.

Q: Arthur Carter?

A: Yes,sir.

Q: Now, on June 8, 1971, did you have a converstaion with Ray Fernandez?

A: Yes, sir.

(T. 15-16, emphasis added)*

* * * *

Q: Who was that?

A: By the agents.

Q: Agent McElroy and Agent Carter?

A: Yes.

(T. 17, emphasis added)

* * * *

Q: Did you sit at the bar?

A: I sit at the bar.

(T.19, emphasis added)

* * * *

Q: Do you recall the conversation concerning narcotics at this time?

A: I don't get that.

---

* "T" refers to minutes of trial, November 28-29, 1973.

Q: Do you recall a converstaion that took place between yourself and Ray about narcotic drugs at this time?

A: No, I don't recall. I don't remember the conversation.

Q: Was there a conversation about it?

A: There was a conversation.

(T. 20-21, emphasis added)

* * * *

Q: Did there come a time when Ray and Carter had a conversation?

A: No. Not if I remember?

Q: You don't remember.

A: I don't remember.

Q: Do you recall any conversation that mentioned cutting of heroin?

A: Yes....

(T. 22, emphasis added)

Valdez's testimony made out the case against appellant. The above leading questions were not a mere eliciting of background information - they were the meat of Valdez's testimony. If the leading questions had related to unimportant matters, this Court might well say that Mr. Lilly abstained from objecting because, tactically, he had more to lose than to gain by objecting. But that was not the case here. Manifestly, Valdez was being led by the prosecutor because Valdez had to be led: Valdez himself virtually protests that he does not

remember. Mr. Lilly's failure to object to the leading questions set forth above served no conceivably useful purpose and permitted the most crucial evidence against appellant to come in literally directly from the mouth of the prosecutor.*

Mr. Lilly was equally ineffective in objecting to serious leading questions during the prosecution's direct examination of the witness Velez:

> Q: (by the prosecutor) No promises were made about the disposition of your case; correct?
>
> A: Right.
>
> (T.129, emphasis added)

The purpose and function of a defense lawyer are well settled: Defense counsel must act at all times as an advocate for his client. In instances of court-appointed counsel, the appellate courts are particularly sensitive to counsel's obligation of advocacy, rather than merely being nominally present or performing as amicus curiae. Anders v. California,

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* Equally characteristic of the at-best passive role which Mr. Lilly assumed during the direct examination of Valdez is his failure to object to seriously damaging hearsay tesimony:

> Q: ...Can you tell us at this time whether people generally knew about your involvement in the heroin business?
>
> A: Like who?
>
> Q: People in the heroin business.
>
> A: Yes...
>
> (T.16)

386 U.S. 738(1967); Entsminger v. Iowa, 386 U.S. 748(1967); United States v. Gregg, 393 F.2d 722, 723(4th Cir. 1968). In the instant case, there is simply no way to explain to appellant Ariel Fernandez-Torres the terrible fact that his court-appointed lawyer sat back and did nothing while the prosecutor spoond-fed the heart of the narration to his own witnesses.*

3) Reprimand for Improper Questioning

In cross-examining Valdez, Mr. Lilly asked him about a verdict in some other case; and for this he was severely reprimanded by the Court in the presence of the jury:

Q: This isn't the first time that you have testified in court?

A: No,sir. This is the second time.

Q: When was the last time you testified?

A: About three or four months ago.

Q: On that occasion the defendant was acquitted?

MR. KAPLAN: Objection

THE COURT: Sustained.

---

* The prosecutor was similarly free to make highly prejudicial comments about totally irrelevant matters, without any objection by Mr. Lilly. Thus, in order to gain sympathy for the witness Velez, the prosecutor observed that the witness' mother "passed away a couple of days ago;correct" (T. 124) Mr. Lilly never objected and never moved to strike.

MR. KAPLAN: Your Honor so instructed ----

THE COURT: Disregard that. Now that question should not have been asked. And you should have asked for a side bar and asked if you had a right to ask it. .... I very rarely rise up like this. But it should not have been done. Especially with an experienced lawyer.

(T. 56-57)

Mr. Lilly's improper question so clearly enraged the Court that the Court apparently was unable to wait until the jury was not present before soundly chastising Mr. Lilly. Whether Mr. Lilly knew in advance that the question was improper is not important as far as this appeal is concerned; what matters is that the jury which decided appellant's fate was made to witness a chewing-out of appellant's lawyer which might well have discredited appellant's defense in the minds of the jurors.

Appellant did not retain Mr. Lilly. He cannot be made to suffer because of Mr. Lilly's incompetence or because of Mr. Lilly's excesses.

4) Discrediting His Client During Summation

In this summation, Mr. Lilly adopted the incredibly stupid tactic of attacking the character of the witness Velez because she had cohabited with appellant. The obvious repsonse which such a blunder invites was immediately forthcoming:

MR. LILLY: Finally, as an instrument or agent to join with us in our efforts to see that justice is done, the government recruited another standout in Martha Velez ... realistically I think, a person of I think at best, questionable morals------

MR. KAPLAN: I object to that.

MR. LILLY: There was testimony, your Honor, as to her life habits and I think the jury can conclude -----

MR. KAPLAN: The same about the defendant.

THE COURT: It is a two-way street. I will let it stand but that's the implication that's to be drawn.

(T. 179-180, emphasis added)

Even more damaging to appellant was the fact that Mr. Lilly's summation tended to undercut appellant's own testimony. Appellant had taken the stand and had specifically denied being with Valdez in the bar on June 9, 1971, as alleged in count one (T. 151-152). Mr. Lilly, in his summation, attempted basically to minimize appellant's role at that meeting in the bar and to put the weight on Valdez, while virtually conceding that appellant was indeed present. (T. 173-174, 176).

By even the most stringent standard of review, Mr. Lilly's undermining of appellant's basic defense and of appellant's own testimony constituted representation which was so "woefully inadequate as to shock the conscience," and transformed appellant's trial into "a farce and mockery of justice." United States v.

Yanishefsky, ___ F.2d ___(2d. Cir.,July 30, 1974), slip op. 5047, 5056-5057.*

* * * *

It must be noted that this was a close case. Carter, the BNDD agent,admitted giving the government money to Valdez, rather than to appellant, and he ackowledged that this procedure was a "deviation" from the drug agency's normal procedure (T. 101). Carter also acknowledged that appellant refused to accept money from him (T. 98), and that Valdez had suggested that Carter give the money to Valdez (T. 100). This deviation in procedure had caused concern at BNDD (T. 112).

The case was two and a half years old. Martha Velez was unable to identify Carter and thus was less able to corroborate Carter's testimony than the prosecution might have wished (T. 126).

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* It is important here to note that we are not claiming that Mr. Lilly is generally incompetent. One need not prove general incompetence of counsel in order to establish ineffective assistance in a specific case. While there are instances of lawyers being ill-trained or chronically drunk, the more common problem is that of poor performance in a specific case. This is, of course, particularly true of public defenders and appointed counsel, who cannot, for all the reasons well known to this Court, provide the kind of time and resources which expensive retained counsel may offer.

Appellant had changed noticeably in his appearance (T. 118-119).

Finally, the jury had enough trouble with this one-defendant case to require it to stay out for five hours and forty minutes (T. 220,22).

Thus,not only was Mr. Lilly's representation defective, but there is a very serious probability that the verdict might have been different, had appellant not been denied the effective assistance of counsel. The judgment should be reversed and a new trial ordered.

POINT I (amplified)

APPELLANT WAS DENIED HIS RIGHT TO CONFRONT THE EVIDENCE OFFERED AGAINST HIM BY THE GOVERNMENT.

Mr. Lilly, in Point I of his brief on behalf of appellant, cited three right-of-confrontation cases. On the question of confrontation generally, we refer this Court to Alford v. United States, 282 U.S. 687(1931), the landmark Supreme Court decision on the subject, and to Davis v. Alaska, 94 Sup. Ct. 1105(1974), the Court's most recent extension of the right to confrontation.*

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* "the right of confrontation is paramount to the State's policy of protecting a juvenile offender."

Davis v. Alaska,supra, 94 Sup. Ct. at 1112.

More specifically, in the area of exclusion of defendants from suppression hearings where 'hijacker profiles' were at issue, while permitting counsel to be present and to cross-examine, this Court has recently reversed the convictions for violation of the confrontation clause. United States v. Ruiz-Estrella, 481 F.2d 723 (2d. Cir.,1973); United States v. Clark, 475 F. 2d 240 (2d Cir., 1973). These two cases are probably the closest analogues to the instant case, and it is worthy of note that the defendants in those two cases presumably would have been of much less assistance to their respective counsel in cross-examination of the 'profile' evidence than appellant would have been in the instant case in confronting the BNDD evidence of his alleged 'fugitive' activities.

The matter should be remanded for a new hearing on the fugitive aspect of the speedy trial issue, with appellant permitted to inspect the BNDD reports and to assist his counsel in cross-examination on that subject.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR A NEW HEARING ON THE SPEEDY TRIAL ISSUE.

Respectfully submitted,

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September 16, 1974

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEVEN BERNSTEIN, being duly sworn, deposes and says:

That on the 16th day of September, 1974, I served the within Supplemental Brief upon David G. Trager, attorney for appellee in this action, at United States Court House, 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Steven Bernstein

Sworn to before me this
16th day of September, 1974.

JESSE BERMAN
Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 19[illegible]